The cases on the doctrine of secondary meaning seem to divide themselves into two classes, depending on whether or not the imitated features are functional, *i. e.*, essential to the commercial success of the article. When the distinctive characteristics are non-functional, the defendant's conduct is palpably unfair, and marked changes are ordered. *Yale and Towne Mfg. Co.* v. *Alder*, 154 Fed. 37, 83 C. C. A. 149; *Hiram Walker* v. *Grubman*, 222 Fed. 478. Even the appearance of the defendant's name is insufficient, unless it is clear no confusion will result. *Fox* v. *Glynn*, 191 Mass. 344, 78 N. E. 89; *Enterprise Mfg. Co.* v. *Landers*, 131 Fed. 240, 65 C. C. A. 587. But when all the elements are functional, usually no relief is given. *Globe-Wernicke Co.* v. *Fred Macey Co.*, 119 Fed. 696, 56 C. C. A. 304; *Marvel Co.* v. *Pearl*, 133 Fed. 160, 66 C. C. A. 226; *Daniel* v. *Electric Hose and Rubber Co.*, 231 Fed. 827; *Edward Felker Mop Co.* v. *U. S. Mop Co.*, 191 Fed. 613, 112 C. C. A. 176; *Diamond Match Co.* v. *Saginaw Match Co.*, 142 Fed. 727, 74 C. C. A. 59. However, a clearly inexpensive noticeable alteration is ordered. *Flagg Mfg. Co.* v. *Holway*, 178 Mass. 85, 59 N. E. 667; *Edison Mfg. Co.* v. *Gladstone*, 58 Atl. 391 (N. J.). In the principal case, all the characteristics are apparently functional, and it would seem that in alleging unfair competition the plaintiff should have had the burden of showing a commercially practicable means of distinguishing the products. The better analysis, however, sanctioned by the result in the principal case, is that the defendant is interfering with the plaintiff's interest in a valuable good will, and the justification that the injury is due to fair competition is an affirmative defense to be proven by the defendant who sets it up.

VENDOR AND PURCHASER — IMPLIED WARRANTY IN SALE OF CATTLE — NEGLIGENCE — DUTY TO DISCLOSE CONTAGIOUS DISEASE. — Defendant sold a calf to the plaintiff, who, although not a veterinary, was known to be skilled in diagnosing and treating diseases of cattle. Defendant knew the calf had ring-worm, a contagious disease common in the locality, but did not disclose the fact. Plaintiff did not buy the calf until he had had it on trial, and he knew the calf was not sound, although he was unaware of the nature of its ailment. The disease was communicated to other cattle belonging to plaintiff and to himself and his son. By statute it was forbidden to sell animals afflicted with contagious diseases. (ANIMAL CONTAGIOUS DISEASES ACT, REV. ST. CAN., 1906, c. 75, §§ 35–38.) *Held*, that there was no implied warranty, and that the statute gave plaintiff no right of action. *O'Mealey* v. *Swartz*, [1918] 3 WEST. WKLY. REP. 98 (Saskatchewan).

The holding that there was no implied warranty seems justified, since the vendee apparently relied on his own judgment. *Hight* v. *Bacon*, 126 Mass. 10; *Waeber* v. *Talbot*, 167 N. Y. 48, 60 N. E. 288. See *Kellogg Bridge Co.* v. *Hamilton*, 110 U. S. 108, 116, and 25 HARV. L. REV. 75. On the question of negligence, however, the court's conclusions cannot be accepted. A vendor, by the reasonable view, should use due care not to sell without warning articles which are likely to cause harm. *Blood Balm Co.* v. *Cooper*, 83 Ga. 856, 10 S. E. 118; *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050. See Brett, M. R., in *Heaven* v. *Pender*, 11 Q. B. D. 503, 509. The English courts seem unwilling to hold a vendor liable for negligence in the sale of animals. *Ward* v. *Hobbs*, 4 App. Cas. 13. However, see *contra*, *Skim* v. *Reutter*, 135 Mich. 57, 97 N. W. 152; *Grimes* v. *Eddy*, 126 Mo. 168, 28 S. W. 756. In the principal case the court seems horrified at the thought that the general principle of negligence would hold one liable for spreading a disease through his person. Such liability has been imposed in at least one case. *Missouri, Kansas & Texas Ry.* v. *Wood*, 68 S. W. 802 (Tex.). It should be for the trier of fact to determine under the circumstances of the particular case whether non-disclosure amounted to negligence. But no judge or jury should be permitted to find it due care to violate a statute designed to prevent the very injuries for which

recovery is sought. See *Osborne* v. *McMasters*, 40 Minn. 103, 41 N. W. 503; *Marino* v. *Lehmaier*, 173 N. Y. 530, 66 N. E. 572. For a general discussion of the subject, see Thayer, "Public Wrong and Private Action," 27 HARV. L. REV. 317.

WILLS — CONSTRUCTION — GENERAL REVOCATORY CLAUSE. — The testatrix duly executed a will consisting of items numbered from one to nine, disposing of all her property. An executor was also appointed. A later paper, titled "Item Ten," began with a general revocatory clause, and merely provided for the care of her estate by an attorney until the arrival of her executor. There was also a statement of her desire to dispose of all her property. *Held*, the express revocatory clause does not revoke the first will. *Owens* v. *Fahnestock*, 96 S. E. 557 (S. C.).

In the construction of wills, the intention of the testator should govern. *Finlay* v. *King's Lessee*, 3 Pet. (U. S.) 346; *Patch* v. *White*, 117 U. S. 210, 6 Sup. Ct. Rep. 617. See *Lemage* v. *Goodban*, L. R. 1 P. & M. 57, 62. Nevertheless, the expressed intention is controlling irrespective of the internal state of the testator's mind. *Jackson* v. *Sill*, 11 Johns. (N. Y.) 201. See *Simpson* v. *Foxon*, 1907 P. 54, 57. This intention must be gathered from all the parts of the will taken together, whether the will consists of several papers executed as one instrument or of separately executed documents. See *Rogers* v. *Rogers*, 49 N. J. Eq. 98, 23 Atl. 125; *Lemage* v. *Goodban*, *supra*. See also PAGE, WILLS, §§ 462, 470. The words, "This is my last will and testament," are very slight evidence of an intention to revoke prior testamentary dispositions. *Stoddard* v. *Grant*, 1 Macqueen's Rep. 163; *Cutto* v. *Gilbert*, 9 Moore P. C. 131; *Gordon* v. *Whitlock*, 92 Va. 723, 24 S. E. 342. See *Aldrich* v. *Aldrich*, 215 Mass. 164, 169, 102 N. E. 487, 490. Even the words, "last and only will," have been held not to be an express revocation. *Simpson* v. *Foxon*, 1907 P. 54. But a general revocatory clause is very much stronger, and *prima facie* revokes prior testamentary papers. *Southern* v. *Dening*, 20 Ch. D. 99; *In re Kingdon*, 32 Ch. D. 604. See *Cadell* v. *Wilcocks*, [1898] P. 21, 26. If it is clear, however, from all the testamentary papers, that the testator had no intention to revoke, the revocatory clause will be treated as mere surplusage. *Denny* v. *Barton*, 2 Phillim. 575; *Van Wert* v. *Benedict*, 1 Bradf. (N. Y.) 114. See *Dempsey* v. *Lawson*, 2 P. D. 98, 105–107; *Smith* v. *McChesney*, 15 N. J. Eq. 359, 363. The principal case is more clearly right, because it can be ascertained from the alleged revocatory instrument itself that there is no intention to revoke. "Item Ten" indicates a continuation of a will of nine items. The testatrix desires to dispose of all her property, yet this paper makes no such provision. Moreover, she speaks of an appointed executor who must necessarily administer under a will disposing of some property.

BOOK REVIEWS

LEMUEL SHAW, CHIEF JUSTICE OF MASSACHUSETTS, 1830–1860. By Frederic Hathaway Chase. Boston and New York. Houghton Mifflin Company. 1918. pp. 329.

Fifty-eight years ago, Chief Justice Lemuel Shaw resigned his great office. Fifty-seven years ago he died. Few men now living remember his face; and probably no lawyer survives who ever argued before him. His judicial record stretches through fifty-six volumes and his name is almost daily on our lips. But until Judge Chase printed his interesting volume, no biography of him had appeared.